FILE COPY

FILED
MAR 14 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-490

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

PERCY GREEN,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

Of Counsel:
JACK GREENBERG
JAMES M. NABRIT, III
WILLIAM L. ROBINSON
MORRIS J. BALLER
10 Columbus Circle
New York, New York 10019
ALBERT ROSENTHAL
435 W. 116th Street
New York, New York 10027

LOUIS GILDEN
722 Chestnut Street
St. Louis, Missouri 63101
Attorney for Respondent

Washington, D.C. • THIEL PRESS • (202) 393-0625

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
ADMINISTRATIVE AND PRE-TRIAL PROCEEDINGS	5
THE TRIAL	8
THE APPEAL	14
SUMMARY OF ARGUMENT	22
ARGUMENT:	
I. The Comment of the Court of Appeals, that "in Cases Presenting Questions of Discriminatory Hiring Practices, Employment Decisions Based on Subjective, Rather than Objective, Criteria Carry Little Weight in Rebutting Charges of Discrimination," Was Proper	26
II. The Comments of the Court of Appeals Properly Set Forth the Issues as to Which Both Parties Might Introduce Evidence at the New Trial	29
III. There Are Alternative Grounds Upon Which This Court Should Affirm the Eighth Circuit's Suggestions to the District Court	35
CONCLUSION	37

TABLE OF CITATIONS

Cases:

Alabama v. United States, 304 F.2d 583 (5th Cir. 1962) affirmed 371 U.S. 37 (1962)	9

Baxter v. Savannah Sugar Refining Corp., ___ F. Supp. ___; 5 EPD ¶8009 at p. 6710 (S.D. Ga. 1972) 28

Beverly v. Lone Star Lead Construction, 437 F.2d 1136 (5th Cir. 1971) 7

Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972) cert. denied 93 S.Ct. 319 (1972) 9, 23, 27

Budd Manufacturing Co. v. N.L.R.B., 138 F.2d 86 (3d Cir. 1943) cert. denied 321 U.S. 778 (1944) 31

Fekete v. U.S. Steel Corp., 424 F.2d 331 (3d Cir. 1970) 8

Flowers v. Local No. 6 Laborers International Union of North America, 431 F.2d 205 (7th Cir. 1970) 7, 34

Gates v. Georgia-Pacific Corp., 326 F. Supp. 397 (D. Ore. 1970) 30

Green v. McDonnell Douglas Corp., 299 F. Supp. 1100 (E.D. Mo. 1969) 2, 7

Green v. McDonnell Douglas Corp., 318 F. Supp. 846 (E.D. Mo. 1970) 2, 13

Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972) ..... *passim*

Griggs v. Duke Power Co., 401 U.S. 424 (1971) ..... *passim*

Jenkins v. United Gas Co., 400 F.2d 28 (5th Cir. 1968) 34

Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970) cert. denied 401 U.S. 954 (1971) 9

King v. Laborers International Union of North America, Union Local No. 818, 443 F.2d 273 (6th Cir. 1971) 31

Marquez v. Omaha District Sales Office, Ford Division 440 F.2d 1157 (8th Cir. 1971) 9

Moore v. Board of Education of Chidester School District, 448 F.2d 709 (8th Cir. 1971) 28

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 34

NLRB v. Barberton Plastic Products, Inc., 354 F.2d 66 (6th Cir. 1965) 31

NLRB v. Historic Smithville Inn, 414 F.2d 1358 (3d Cir. 1969) 31

Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970) 9

Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969) 34

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) 7

Rosen v. Public Service Gas & Electric Co., 409 F.2d 775 (3d Cir. 1969) 34

Rowe v. General Motors Corporation, 457 F.2d 348 (5th Cir. 1972) 23, 27

Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970) 31

Udall v. Tallman, 380 U.S. 1 (1965) 31

United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) 23, 28

United States v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969) 9

United States v. IBEW, Local 18, 428 F.2d 144 (6th Cir. 1970) cert. denied 400 U.S. 943 (1970) 9

United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971) cert. denied 406 U.S. 906 (1972) 9, 30

Other Authorities and Statutes:

Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969) 28

Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971) 28

EEOC Decision No. 70-925, 1 CCH Employment Practices Guide ¶6158 (June 22, 1970) 31

EEOC Decision No. 71-1902, 1 CCH Employment Practices Guide ¶6281 at p. 4498 (April 28, 1971) 31

EEOC Decision No. 72-0264, 1 CCH Employment Practices Guide ¶6292 at p. 4520, n. 3 (August 6, 1971) 31

Stern & Gressman, Supreme Court Practice 298 (4th ed. 1969) 18

9 Wigmore on Evidence, Sec. 2494 (3d ed. 1940) 21

Section 10(c) NLRA as amended, 29 U.S.C. Sec. 160(c) 34

42 U.S.C. §1981 ..... 13, 14

Section 703(a), 42 U.S.C. §2000e-2(a) 3, 5, 29

Section 704(a), 42 U.S.C. §2000e-3(a) 3, 5, 14, 15, 29

Section 706(g), 42 U.S.C. §2000e-5(g) 4, 34

110 Cong. Rec. 2728 (1964) 32

110 Cong. Rec. 13,825 (1964) 32

U.S. Sup. Ct. Rule 40, para. 1(d)(1) 17

U.S. Sup. Ct. Rule 40, para. 1 (d)(2) 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-490

McDONNELL DOUGLAS CORPORATION,

Petitioner,

v.

PERCY GREEN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

The original majority , concurring and dissenting opinions of the United States Court of Appeals for the Eighth Circuit filed on March 30, 1972, and the revised majority opinion and supplemental dissent filed on May 12, 1972, are reported at 463 F.2d 337, and are reprinted in Appendix A to the Petition for Writ of Certiorari, pp. A-1 through A-29 and Appendix B thereto, pp. A-31 through A-38.

The memorandum opinion of the United States District Court for the Eastern District of Missouri granting defendant's motion to strike that portion of the amended complaint which alleged denial of employment due to race, filed May 13, 1969, is reported at 299 F. Supp. 1100, and reprinted at A. 31-A. 36.[1]

The memorandum opinion of the District Court filed on September 25, 1970, dismissing plaintiff's action after trial and granting judgment to defendant, is reported at 318 F. Supp. 846, and reprinted in Appendix D to the Petition for Writ of Certiorari, pp. A-40 through A-49.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred, in including among the standards it enunciated for the guidance of the District Court on remand the admonition that "in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination."

2. Whether in the context of the instant case the Court of Appeals erred, in including among those standards, the statement that proof that an applicant for employment was qualified, that he was denied the job, and that the job remained open, presents a prima facie case of discrimination—followed immediately by the qualification that the applicant's past participation in unlawful conduct directed at the employer might indicate lack of a responsible attitude toward performing work for that employer, but that the applicant in turn could show

---

[1]Unless otherwise indicated, references to "A. ___" will be to the Appendix prepared following granting of certiorari.

that the employer's reliance on such unlawful conduct was pretextual or otherwise show racially discriminatory hiring practices by the employer which affected its decision.

STATUTES INVOLVED

The following portions of Title VII of the Civil Rights Act of 1964, Public Law 88-352, 42 U.S.C. 2000e et seq.:

Section 703(a), 42 U.S.C. §2000e-2(a):

(a) It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 704(a), 42 U.S.C. §2000e-3(a):

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge,

testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Section 706(g), 42 U.S.C. §2000e-5(g):

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charge in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

Respondent Percy Green [hereinafter sometimes "Green" or "plaintiff"] is a black citizen of St. Louis, Petitioner McDonnell Douglas Corporation [hereinafter sometimes "McDonnell" or "defendant"] is a large

aircraft and aerospace manufacturer with corporate headquarters and production facilities in St. Louis, where it employs over 30,000 people.

ADMINISTRATIVE AND PRE-TRIAL PROCEEDINGS

On July 26, 1965, Green applied to McDonnell for a job as an electric mechanic, in response to McDonnell's newspaper advertisements of such openings for immediate employment. He had been employed by McDonnell for eight years (except for 21 months in the Army) (A. 52-79), had a good work record, and McDonnell has never questioned his qualifications for the job (A. 323, 359, 494-75). When McDonnell refused to employ him although many such positions were still open (A. 454, 492), Green filed a charge with the Equal Employment Opportunity Commission [hereinafter "EEOC"] on September 14, 1965, alleging: "Discrimination was practiced because of my race and because of my persistent involvement with the Civil Rights Movement." (Exh. A. to Complaint; Reprinted infra at 1a-3a). On May 8, 1967, EEOC found probable cause to believe McDonnell had violated Section 704(a) of the Civil Rights Act of 1964 [hereinafter "Title VII" of "the Act"] by refusing to accept Green for employment because of his involvement in civil rights activities. It made no finding with respect to Green's Section 703(a) ground for his charge, discrimination because of race. (Exh. C., Reprinted infra at 6a-10a). On March 19, 1968, EEOC notified Green that conciliation efforts had failed to achieve voluntary compliance with Title VII and that Green was authorized to institute a civil action in the appropriate district court within thirty days. (Exh. E to complaint, reprinted infra at 4a-5a).

On April 15, 1968, Green filed a complaint in the United States District Court for the Eastern District of Missouri, alleging employment discrimination against him in violation of Title VII because he had opposed unlawful employment practices and because of his involvement in civil rights activities. The complaint prayed for injunctive relief, an order requiring McDonnell to hire Green, back pay, attorney's fees and costs (A. 6). McDonnell's answer denied the material allegations of the complaint (A. 9).

Plaintiff's Interrogatories, Set No. 2, filed October 24, 1968, asked for monthly statistics concerning McDonnell's work force in the St. Louis area from January 1, 1961 to date, broken down by job classification and by race, as well as statistics as to transfers from one classification to another, the criteria for eligibility for transfer, lines of progression, seniority standards, requirements for initial employment, and statistics concerning the number of refusals to employ or transfer broken down as to race (A. 11). McDonnell filed objections to these Interrogatories on grounds of irrelevance and burdensomeness (A. 15), and the objection was sustained by the District Court on grounds of burdensomeness, on December 31, 1968 (A. 18).

Green then moved, on January 13, 1969, for an order to require McDonnell to produce and permit the inspection and copying or photographing of its records covering essentially the same matters (A. 18), pointing out that "plaintiff would have the burden of obtaining the information from the books and records of the defendant" (A. 19). McDonnell objected again (A. 22), incorporating by reference the assertions of irrelevance it had previously advanced in connection with the Interrogatories. These, in turn, had claimed that the pleadings raised issues only as to one man in one job on one day

while the information sought covered an eight-year period, transfers, promotions, and other jobs and applicants. The District Court on February 14, 1969 sustained most of the objections (A. 23), noting: "There is no allegation in the complaint that the reason plaintiff was not employed was because he was a Negro," and adding, with reference to the statistical breakdown of McDonnell's work force, by race and by job classification, "All of these matters requested by the plaintiff showing employment and the pattern of employment are completely unrelated to the suit in question and are not calculated to the discovery of any admissible evidence. . . . (A. 24). The court ordered production only of documents showing the requirements for initial employment and data as to the use of tests and interviews, but limited to the month of July 1965.

On March 20, 1969, Green filed an Amended Complaint, which added allegations that he had been denied employment because of his race and color (A. 25). The next day, McDonnell moved to strike these additional allegations, and the motion to strike was granted by the District Court of May 13, 1969 (A. 30). The court's Memorandum Opinion (299 F. Supp. 1100; A. 31) construed the Act to require an affirmative finding of reasonable cause by EEOC as a jurisdictional prerequisite to a civil action, and held that the lack of such a finding as to racial discrimination as distinguished from discrimination for civil rights activities therefore prevents Green from including in his action any claim of employment discrimination based on race.[2] Plaintiff's motion for a

[2]Decisions of the Courts of Appeals have unanimously rejected the rule followed by the district court here. E.g., *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Beverly v. Lone Star Lead Construction*, 437 F.2d 1136 (5th Cir. 1971); *Flowers v.*

certification pursuant to 28 U.S.C. §1292(b) to permit an appeal of an interlocutory order was denied, and an attempt to appeal without such a certification was dismissed by the Eighth Circuit for lack of jurisdiction on June 26, 1969.

THE TRIAL

The trial was held on January 12-15, 1970. Almost all of the testimony was concerned with Green's individual employment experience with McDonnell, his civil rights activities, his lay-off in 1964 and his qualifications as compared with those of white employees in the same category who were not laid off, and McDonnell's refusal to re-employ him in 1965.

There was testimony on both sides concerning the presence or absence of racial motivation for McDonnell's refusals to transfer or promote Green and for his lay-off. This must be regarded, however, as having been directed primarily to the issue raised by the pleadings–the credibility of McDonnell's assertion that its refusal to rehire Green was based on illegal activities on his part in protesting McDonnell's employment practices rather than on retaliation for his having "opposed any practice made an unlawful employment practice by this title." (Section 704(a) of the Act). This may be seen not only from the characterization of the action by the court, in its prior orders limiting discovery, as based only on retaliation for protected civil rights activities, but also in the confinement of proof on both sides almost exclusively to matters involving Green individually, as distinguished from the

---

Local No. 6, Laborers International Union of North America, 431 F.2d 205 (7th Cir. 1970); *Fekete v. U.S. Steel Corp.*, 424 F.2d 331 (3rd Cir. 1970).

general employment practices of McDonnell and the racial composition of its work-force which would have been highly relevant to an issue of racial discrimination.[3] Moreover, such evidence as to the percentage of blacks in McDonnell's employ, broken down into levels of responsibility, had not been available to Green's counsel for purposes of trial preparation. Part of this evidence was produced at the trial by Peter Robertson, an EEOC official, rather than by McDonnell (A. 136-137), and part only after the trial was concluded (A. 267).

The record strongly suggests that Green was subjected to racial discrimination while employed by McDonnell when he attempted to transfer to a research department. When he first requested transfer, he was told by Mr. Edward Sinecki, a supervisor, that the transfer might

---

[3]Courts of appeals have repeatedly held, without exception, that statistics as to the racial composition of an employer's work force, both in total numbers and as allocated among positions of differing levels of responsibility, are highly relevant evidence of discrimination, may in appropriate cases give rise to presumptive proof of discrimination, and are relevant to the question of the motivation behind employment action taken in individual cases. Cf. *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972, cert. denied, ___ U.S. ___, 93 S.Ct. 319 (1972); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972); *United States v. Hayes International Corp.*, 415 F.2d 1038, 1041, 1043-44 (5th Cir. 1969); *United States v. IBEW, Local 18*, 428 F.2d 144, 151 (6th Cir. 1970, cert. denied, 400 U.S. 943 (1970); *Marquez v. Omaha District Sales Office, Ford Division*, 440 F.2d 1157, 1160-61 (8th Cir. 1971); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 426, 428 (8th Cir. 1970); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971); cf. *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962, affirmed, 371 U.S. 37 (1962): "In the problem of racial discrimination, statistics often tell much, and courts listen."

result in Green's termination (A. 60) and he was discouraged from transferring into the department. After Green was discouraged, Leo Jeffress, a white man, transferred and later gained promotion to Laboratory Technician A (A. 68, Pl. Exh. 33, A. 578).

Later Green was the victim of racial discrimination when he was finally permitted to transfer to the research department in July, 1963. He was the only black man among 100 white technicians (A. 69). At the time of the transfer he was not taken on a tour of the department, although it was a practice of McDonnell to take all potential new employees on this tour (A. 65). Nor was he given a training period, although it was a practice to give all new employees this training (A. 69).

Green was further victimized by racial discrimination when he, the only black in the department, was laid off in August 1964.[4] Supervisors Godefroid and Sinecki ranked all the employees of the department according to ability, potential, performance and cooperation, etc. (A. 144, 289). This ranking was known as a "totem pole" (Pl. Exh. 33, Tab 17, A. 570). In the ranking process, engineers who had an opportunity to evaluate the work of the employees were given an opportunity to express their opinions as to the employees position on the totem pole. Mr. Moahlenkamp, an engineer, expressed his opinion that one Richardson, a white man, did not deserve a ranking above Green (A. 159, 383). Peter Robertson,

---

[4]The claim of racial discrimination in Green's lay-off was dismissed as being barred by the statute of limitations; and respondent did not cross appeal on this issue. However, evidence of discrimination in connection with the lay-off is never-the-less relevant to the credibility of testimony with respect to McDonnell's motives in refusing to rehire Green.

executive director of the Missouri Commission on Human Rights in 1964 testified that on August 17, 1964, a decision was made to lay-off and that a line was drawn over Green's name on the totem pole by Vice President Krone (A. 141), making Green the highest ranked laboratory technician B subject to lay-off (A. 374) (Pl. Exh. 33, Tab 17, A. 570). Thereafter, on August 28, 1964 Green was laid-off. Fourteen people below Green on the totem pole were retained, eleven who were never scheduled for lay-off and three who were scheduled for lay-off but transferred (A. 167). Before the lay-off, Green was approached for the purpose of determining whether he would accept a transfer to Cape Kennedy. He expressed interest in the transfer, but was advised by a Mr. Hammond that he shouldn't accept the appointment because of the racial climate in Florida (A. 153, 311). At the time of the lay-off, none of the employees working at Cape Kennedy were considered surplus employees subject to lay-off (A. 313, Pl. Exh. 33, Tab 20, A. 578).

Green was offered an optional test to transfer to another department within the company at the time of lay-off; but he declined to take the test unless those who were slated to be retained would take the same test. Green stated that if his score was not better than 3/4 of the people the company planned to retain, he would be willing to be laid off. McDonnell rejected Green's suggestion that all employees be tested (A. 72, 75). Two people below him on the totem pole failed the examination and were retained by McDonnell and transferred within the company (A. 573). One was a Mr. Graville who ranked 20 positions below Green. A Mr. Rauscher, who was 19 positions below Green, was not asked to take the examination and was nevertheless retained in the department.

There was also uncontradicted testimony that Green had participated in a "stall-in" of automobiles at a distance of one quarter mile to two miles from petitioner's plant that blocked access roads to the plant for about ten minutes for the purpose of dramatizing McDonnell's employment discrimination, and that he had pleaded guilty to a misdemeanor of obstructing traffic and had been fined $50. (A. 114 et seq.) It was also uncontradicted that Green had participated in the picketing of an office building in St. Louis where some McDonnell employees worked, to dramatize a protest against McDonnell's employment practices, on July 2, 1965, the effective date of Title VII, and that in the course of that demonstration the front door of the building had been chained; it was not shown, however, that Green had known about or participated in the plan to chain the building (A. 132-33).

Green had been an active civil rights leader, and was particularly concerned with employment discrimination in the St. Louis area, both by McDonnell and by other employers (A. 69-72, 79-84, 92-94). Other protest activities engaged in by him included the filing of charges of employment discrimination against McDonnell with various federal and state agencies, and the peaceful picketing of a road leading to the home of McDonnell's board chairman (A. 79-84). None of his activities while employed caused him to be absent or affected his performance on the job (A. 380). There was testimony by McDonnell officials that the refusal to rehire him was based on the "stall-in" and the "lock-in", but this was contradicted by other McDonnell officials who included the picketing near the Chairman's home[5] among the

[5] There was no violence, damage to property, or interference with traffic (A. 81, 154). The picketing was clearly a constitutionally protected form of communication of opinion concerning

reasons for rejecting him (A. 163, 434, 492), and by Charles L. Windsor, McDonnell's Personnel Manager, who said that he had 15 or 20 reasons for refusing to rehire Green, although he refused to enumerate them (A. 237-38, 411-12, 433-34).

If Green had been given timely access to statistics showing the small percentage of McDonnell's employees that were black, and the concentration of most of them in menial jobs (Pl. Exh. 33, A. 578), he would have had the opportunity of demonstrating the relationship of these patterns to the credibility of McDonnell's asserted reasons for refusing to rehire him.

On September 25, 1970, the District Court granted judgment to the defendant, and dismissed plaintiff's complaint with prejudice (A. 45). In its Memorandum Opinion, the court for the first time specifically treated the issue of racial discrimination as in the case stating:

> The testimony and evidence before the court fails to establish by its greater weight, or preponderance, that defendant's refusal to rehire plaintiff resulted from racial prejudice or plaintiff's legitimate civil rights activities. It seems clear from the record that defendant's reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the "stall in" and the "lock in" demonstrations. The burden of proving other reasons was on the plaintiff. (318 F. Supp. at 850).

The District Court also rejected a claim, raised in plaintiff's post-trial brief, that Green's lay-off in 1964 (before the effective date of Title VII) violated the Civil Rights Act of 1866, 42 U.S.C. §1981.

---

an issue of public concern—the employment practices of a major employer and government contractor.

It summarized its conclusions as follows:

(a) Plaintiff has not shown that defendant was motivated by racial prejudice or because of plaintiff's legitimate civil rights activities.

(b) Plaintiff's layoff claim under 42 U.S.C. §1981 is barred by the statute of limitations.

(c) The Civil Rights Act does not protect activity which blocks entrance into or from and employer's plant or office.

(d) Defendant's refusal to reemploy plaintiff was based on plaintiff's misconduct, which justified the refusal to rehire. (318 F. Supp. at 851)

THE APPEAL

Green filed a timely appeal with the Court of Appeals for the Eighth Circuit, raising the following contentions:

(1) The trial court erred in dismissing his claim under 42 U.S.C. §1981 for relief from his allegedly unlawful lay-off.

(2) The trial court erred in determining that his participation in the "lock-in" and "stall-in" demonstrations did not fall within the protection of 42 U.S.C. §2000e-3(a).

(3) The trial court erred in striking the allegations of the complaint which charged McDonnell with denying him employment for reasons of race. (463 F.2d at 340).

These issues were disposed of by the Court of Appeals as follows: The Court unanimously affirmed the ruling that any claim based on the 1964 lay-off was barred by the statute of limitations. 463 F.2d at 340-41. Since Green has not cross-petitioned, this issue is not before this Court.

The Court also unanimously affirmed the ruling that the "stall-in" was not protected activity within the coverage of Section 704(a) of the Act, 42 U.S.C. §2000e-3(a). 463 F.2d at 341.[6] Again, Green has not cross-petitioned, and this issue is out of the case.

The Court also unanimously held that the District Court erred in striking Green's allegations of racial discrimination from the complaint and in holding that an EEOC finding of reasonable cause as to Green's charge of discrimination because of race was a jurisdictional prerequisite to inclusion of that charge in an action under Title VII. The petitioner has not challenged this determination of error in its Petition for Certiorari or its Brief (cf. "Questions Presented", Petition p. 2; Petitioner's Brief, p. 2) and has apparently conceded the point (cf. Petitioner's Brief, p. 11).

The majority of the Court held that this error was prejudicial, and that Green was entitled to a new trial on the question of whether he was refused employment because of race. The opinion of the court stated:

> We cannot accept McDonnell's suggestion that it should prevail on an issue that Green was not privileged to present. We cannot say that the district court's action in striking the racial discrimination claim did not hamper the preparation and presentation of Green's case, notwithstanding the commend-

---

[6]Two of the three judges of the panel, however, while treating the "lock-in" as also unprotected activity, deemed the charge that Green had some responsibility for the chaining of the door to have been unsupported, and hence a possible basis for concluding that the reasons advanced by McDonnell for refusing to hire Green may have been pretextual. 463 F.2d at 344, n. 6; 463 F.2d at 345; cf. 463 F.2d at 346-48.

able zeal displayed by his counsel in producing an abundant record of events and circumstances relating to Green's employment relationship with McDonnell. (463 F.2d at 342)

The point was developed in greater detail in Judge Lay's concurring opinion (463 F.2d at 344-45):

> The court's order refusing plaintiff leave to amend his complaint and utilize discovery on the issue of racial discrimination because the E.E.O.C. had not based its finding of probable cause on this ground is conceded error. Argument is made that nevertheless the issue was tried by consent and that the trial judge found there was insufficient evidence to support plaintiff's claim. The ancient Hebrew expression, "They tie our hands and then reproach us that we do not use them", gives sufficient response here.
>
> Trial counsel who is foreclosed from pleading and pursuing discovery of facts relating to a particular legal theory is scarcely prepared to try the case on that theory. It is not realistic to urge that thereafter where facts pertaining to that theory are drawn into the case, the issue has been tried by consent and the party has no cause for complaint. If the adversary system means anything at all it is that lawsuits and issues are not designed to be tried by happenchance. To make inquiry as to what additional facts could have been shown is remote to the practicalities of the trial of any lawsuit. Preparation is the guts and heart of effective representation in any litigation. The very contemplation of trying a specific legal issue can trigger mental processes as to strategy in building documentary and testimonial proof of the case. The order of proof, as well as the direct and cross-examination, may well vary as the strategy to

present the issues as planned. Without adequate preparation by interviewing the witnesses, by discovery of facts unknown, by collation of the facts, by marshalling the documentary evidence, by investigating the law as to the particular issue to be tried, it is little wonder that a trial court dismisses a suit for insufficient evidence. Here, the trial court passed on a claim that it earlier foreclosed from being raised in the pleadings and on which it had refused discovery. For the above stated reasons that finding must be reversed.

Judge Johnsen, in dissent, expressed the view that the error was harmless, but issue of "harmless error" has not been raised by petitioner, whose "Questions Presented" in both its petition and brief on the merits make no reference to it, nor can it possibly be deemed a subsidiary question fairly comprised therein" [U.S. Sup. Ct. Rule 40, para. 1(d)(1)]. Moreover, there was no reference to any contention of harmless error in any part of the Petition for Certiorari and only a terse allusion in the "Statement of the Case" portion (pp. 11-12),[7] but not in

[7]There is no basis for Petitioner's statement (p. 11 of its brief on the merits) that "the parties actually tried the issue of racial discrimination by consent." There was no such consent, express or implied, and Green was obliged by the District Court's confinement of the case to the issue of retaliation to adopt a strategy of bringing in evidence of racial discrimination only tangentially, in the hope of impeaching McDonnell's claim that unlawful, rather than lawful, actions by Green protesting its employment policies motivated its refusal to hire him. Moreover, as pointed out in both the majority and concurring opinions of the Court of Appeals, the refusal of the District Court to permit Green to obtain discovery of evidence concerning McDonnell's employment practices and their racial consequences made adequate preparation for the trial of this issue impossible. 463 F.2d at 342, 345. And the statement in Petitioner's brief (p. 12, n. 6) that McDonnell supplied Green "with all of the relevant material sought to be discovered by the

the Argument, of its brief on the merits. Hence, if there were any issue of "harmless error", it would not be before this Court. U.S. Sup. Ct. Rule 40, para. 1(d)(2); Stern & Gressman, Supreme Court Practice 298 (4th ed. 1969). We shall therefore not brief it unless requested to do so by the Court.

Thus, only those portions of the Court of Appeals opinion that sought to guide the District Court upon the remand of the case are properly before this Court. Before detailing them, it is essential that we remind the Court that the majority opinion was modified substantially in response to McDonnel's petition for rehearing, that those portions of the original opinion that were withdrawn are nullified for all purposes, and that only the modified opinion is here for review.[8]

---

motion for production and the interrogatories" is accurate only if "relevant" is read to mean "relevant to the issue of retaliation," and only if it is recognized that key material was produced only at or even after the trial. The transcript references cited by Petitioner (A. 232-33, 267) show that defense counsel, in asking that a trial subpoena be quashed, claimed that only records as to Green were pertinent, and plaintiff's counsel agreed to the quashing of the subpoena if certain statistical information relating to the period closest to the refusal to hire Green (A. 265) were produced within a week *after* the close of the trial.

[8]The original opinion of the Court of Appeals was filed March 30, 1972. In response to a petition by McDonnell for a rehearing, on May 12, 1972, Judge Bright modified his opinion of the court by striking and replacing a portion thereof, Judge Lay joined in the revised opinion and adhered to his prior separate concurring opinion, and Judge Johnson filed a supplemental dissenting opinion (A. 48). A petition for rehearing en banc was denied on June 28, 1972, by an equally divided court, and treating it also as a renewed petition for rehearing to the original panel, it was denied by that panel, Judge Johnsen dissenting (A. 50-51).

The final, modified, majority opinion of the Court of Appeals does not appear anywhere in consecutive, uninterrupted format. In the Federal Reporter it has to be pieced together out of 463 F.2d pages 338 to 343 (near bottom of first column), plus page 352 (near bottom of first column) to 353 (end of first column). Perhaps as a consequence, major parts of Petitioner's argument are addressed to statements that have been excised from the opinion. For the convenience of the Court, we are therefore printing at the end of this brief the full text of the majority opinion in its final form.

In several important respects, the petitioner attacks purported "holdings" by the Court of Appeals which are in reality *not* to be found in the court's modified opinion.

1. In remanding, the Court of Appeals made clear that both "parties should be permitted to present such additional evidence as may be relevant to the [racial discrimination] issue." (463 F.2d at 343). Nowhere did it forbid, or even cast aspersions on subjective evidence to prove motivation; Petitioner's Question Presented No. 2, and the large portions of its brief devoted to the question of the value of subjective evidence (pp. 17, 18, 34-39) are totally irrelevant.

The court addressed itself to subjective *criteria* for employment, not subjective *evidence* of motivation. It said (463 F.2d at 352):

> "in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination. . . . In Title VII, Congress has mandated the removal of racial barriers to employment. Judicial acceptance of subjectively based hiring decisions must be

limited if Title VII is to be more than an illusory commitment to that end, for subjective criteria may mask aspects of prohibited prejudice. Employers seldom admit racial discrimination. . . . Its presence is often cloaked in generalities or vague criteria which do not measure an applicant's qualifications in terms of job requirements. . . . "

2. The revised opinion of the Court of Appeals (463 F.2d at 353) did not, as contended by petitioner (Brief pp. 17, 20-21), ordain any shift in the burden of proof. It said:

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. However, an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer.
>
> Of the several civil rights protests which Green directed against McDonnell, the employer selected two, the "lock-in" and the "stall-in", as reasons for its refusal to rehire Green. Green should be given the opportunity to show that these reasons offered by the Company were pretextual, or otherwise show the presence of racially discriminatory hiring practices by McDonnell which affected its decision. [Footnote omitted].

The earlier, superseded, opinion had included, after "we think he presents a prima facie case of racial discrimination," the clause "and the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job." (463 F.2d at 344). But

even if "burden" is construed as meaning "burden of proof", as distinguished from "burden of coming forward with evidence," this comment is completely out of the case. Indeed, its deletion can be interpreted only as a clear expression of intention by the Court of Appeals *not* to hold that there is any shift of burden.

Moreover, the reference to "prima facie case of discrimination" is followed immediately by an invitation to both parties to introduce further evidence–McDonnell to show that Green's unlawful conduct might indicate a lack of a responsible attitute toward performing work for it, and Green to show that his unlawful conduct was a pretext on the part of McDonnell for refusing to hire him or that there were other racially discriminatory hiring practices which affected its decision. Clearly, what the court was inviting was further evidence from both sides of the movitation behind the refusal to hire Green, without reference to any hint of a shift in the burden of persuasion.[9]

---

[9]Neither can it be maintained that the reference to a "prima facie case of racial discrimination" connotes a shift in burden of proof. "Prima facie case" is an ambiguous phrase, which may mean either (a) that a plaintiff establishing it will prevail unless the defendant introduces a sufficient quantum of rebutting evidence, or (b) that there is merely sufficient evidence to prevent a directed verdict for the defendant or an involuntary dismissal at the close of plaintiff's case but giving the plaintiff no assurance that he will prevail. See 9 Wigmore on Evidence, §2494 (3d ed. 1940). In the context in which it was used in this case, with the deletion of the reference to the burden passing, and the clear contemplation of further evidence on the issue by both parties, there can be no basis for the contention that the court intended a shift in burden of proof.

3. Neither is there any basis for the petitioner's interpretation (Brief, pp. 19-24) of the reference to "a black man" as suggesting that a different standard is to be applied to blacks than to whites. The reference is obviously made in the context of a specific case in which a black man claimed he was discriminated against because he was black. In the less likely, but possible, case of a claim by a white man that he was discriminated against because he was white, the same principle would apply—that if he proved that he possessed the qualifications for the job, and was denied the job, and the job continued to remain open, he would present a prima facie case of racial discrimination against him. If he had participated in an unlawful demonstration, the employer could show that that, rather than discrimination against whites, had motivated the refusal to hire him, and the plaintiff in turn could show that the asserted reason was a mere pretext or otherwise show that hiring practices discriminatory against whites had affected the employer's decision. And the same principles would apply if the claim of discrimination were based on religion, national origin, or sex.

In short, the guidelines enunciated by the court reflect the practical problems faced by a plaintiff in trying to prove a discriminatory motivation almost never openly admitted, and to protect such a plaintiff from automatic dismissal at the close of his case when he has presented evidence from which a reasonable inference of discrimination can be drawn.

SUMMARY OF ARGUMENT

1. The Court of Appeals neither precluded, nor cast aspersions on the weight of, subjective evidence by McDonnell to explain or justify its actions. Petitioners have completely misread the opinion, which declares that

subjective *criteria* for employment decisions "may mask aspects of prohibited prejudice", and that therefore "judicial acceptance of subjectively based hiring decisions must be limited if Title VII is to be more than an illusory commitment" to the removal of racial barriers to employment mandated by Congress.

The question of subjective evidence is not in this case. The totally unrelated question of subjective criteria for employment decisions is in the case, but has not been raised by Petitioner. Moreover, the statements of the Court of Appeals on this subject were merely dictum, or at most enunciation of the reasoning underlying the court's holding. They therefore do not seem to be appropriate for review here.

If, however, the question of the propriety of these statements of the Court of Appeals is properly here for review, they are in accord with authority in other circuits (*Rowe v. General Motors Corporation*, 457 F.2d 348, 359 (5th Cir. 1972); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972), *cert. denied*, ___ U.S. ___, 93 S.Ct. 319 (1972); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 655 (2d Cir. 1971)), and reflect the realistic judgment that if courts do not view subjective employment decisions with some skepticism racial discrimination can flourish undetected and unredressed.

2. Contrary to Petitioner's asserted apprehensions, the Court of Appeals did not shift the burden of proof from plaintiff to defendant; such language in its earlier opinion as might have been so regarded was carefully excised from its revised majority opinion. The court's statement that proof that Green was qualified for the job, that he was refused employment, and that McDonnell continued to try to fill the job, constituted *prima facie*

evidence of racial discrimination must be read, in context, as meaning only that such proof by Green would be sufficient to safeguard him from having his case dismissed when he rested. The court recognized that in many employment discrimination cases, the plaintiff might be able to prove little more than this, since outright admission by employer that they have been discriminating is rarely encountered.

The court made clear that it contemplated further evidence by both sides–bulwarking by McDonnell of its assertion that Green's unlawful activities were its reason for refusing to hire him, and rebuttal by Green to show that the "stall-in" was a mere pretext for a decision actually based on racial prejudice.

Similarly, the revised majority opinion did not require McDonnell to show that the "stall-in" was job-related in order for McDonnell to be permitted to prevail on the issue of whether it–rather than racial discrimination–motivated McDonnell's refusal to rehire Green. The Court of Appeals had no occasion to reach that issue in this case, and neither squarely relied on nor had to squarely rely on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

3. There is nothing in the decision or opinion of the Court of Appeals that suggests a double standard, whereby blacks would be accorded any preference either in employment decisions or in the conduct of Title VII litigation. The court's statement, that in some circumstances "a black man" may present a *prima facie* case of racial discrimination, must be viewed in the context of the instant case itself, in which the plaintiff was a black man. And the court's choice of language may also reflect the fact that in our society racial discrimination against black men is encountered thousands of times more

frequently than racial discrimination against white men, so that one writing about racial discrimination will almost automatically and unconsciously express himself in terms of discrimination against blacks. But the principle enunciated would apply equally in any case in which unlawful discrimination was claimed, and if a white man claimed he had been discriminated against because of his race, he could make a *prima facie* case in the same manner.

Petitioner has wrenched three words, "a black man" completely out of context, apparently to catch the attention of this Court and to give the impression that this case raises the throny issue of preferential treatment for blacks. There is no justification for such a misinterpretation of the decision of the court below.

4. Although respondent had only limited opportunity to conduct discovery; the record contains evidence which would justify this Court's affirmance of the decision below on the alternative ground that one presents a *prima facie* case of racial discrimination in employment by showing a history of prior racial discrimination coupled with proof that a qualified black man was denied a job and the position remained open.

ARGUMENT

I.

THE COMMENT OF THE COURT OF APPEALS, THAT "IN CASES PRESENTING QUESTIONS OF DISCRIMINATORY HIRING PRACTICES, EMPLOYMENT DECISIONS BASED ON SUBJECTIVE, RATHER THAN OBJECTIVE, CRITERIA CARRY LITTLE WEIGHT IN REBUTTING CHARGES OF DISCRIMINATION," WAS PROPER.

Petitioner has mis-read the opinion of the Court of Appeals, and has argued that it precludes, or treats as of little or no value, subjective evidence that McDonnell may offer at the new trial as to its motives in refusing to rehire Green. As pointed out above, the court was not referring to subjective evidence, but was merely restating the obvious fact that allowing employment decisions to be made on a purely subjective basis, without objective guidelines, may easily serve as a mask for, or afford ready opportunities for, covert discrimination.

We turn then to what the court below said, rather than what the petitioner misunderstood it as having said. It is not clear that any issue as to the propriety of the comment of the Court of Appeals on subjective criteria is even before this Court, (a) because the point was not raised as such by the petitioner, and (b) because it is little more than dictum or subsidiary reasoning, since it does not purport to be dispositive of any specific matter to be decided by the District Court on remand.

Nevertheless, if this remark of the Court of Appeals is deemed appropriate for review here, it should be noted that, far from an innovation, it is in accord with prevailing doctrine in Title VII cases in other circuits, and in conflict with none.

For example, in *Rowe v. General Motors Corporation*, 457 F.2d 348 (5th Cir. 1972), procedures that left most of the power of decision as to promotions and transfers to the subjective judgment of foremen were held to be susceptible of abuse:

> All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action. See, Hawkins v. North Carolina Dental Society, 4 Cir. 1966, 355 F.2d 718, 723-24; Cypress v. Newport News General and Nonsectarian Hosp. Assn., 4th Cir., 1967, 375 F.2d 648, 655; Meredith v. Fair, 5th Cir., 1962, 298 F.2d 696, 702, cert. denied, 1962, 371 U.S. 828 . . . (457 F.2d at 359).

What the Court of Appeals for the Fifth Circuit said with respect to promotion and transfer is of course equally applicable to hiring.

In *Brown v. Gaston County Dyeing Maching Co.*, 457 F.2d 1377 (4th Cir., 1972), *cert. denied*, ____ U.S. ____, 93 S.Ct. 319 (1972), the court said (at 1382):

> In United States v. Bethlehem Steel Corp., 446 F.2d 652, 655 (2nd Cir. 1971), the court identified the lack of "fixed or reasonably objective standards and procedures for hiring" as a discriminatory practice. Gaston's employment policies suffer the same deficiency. The company lacks objective guidelines for hiring, for pay increases within job classifications, and for promotion or transfer from one job to another.

Accord: *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 655 (2d Cir. 1971); *Baxter v. Savannah Sugar Refining Corp.*, 5 EPD ¶8009, at p. 6710 (S.D. Ga. 1972); see also as the analogous earlier Eighth Circuit case cited by the court below, *Moore v. Board of Education of Chidester School District*, 448 F.2d 709 (8th Cir. 1971). See also Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1677 (1969):

> Courts traditionally have been willing to review subjective selection procedures for indications of discrimination, examining statistics and the objective qualifications of accepted whites and rejected blacks.

And see Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1117-18 (1971).

Thus, the comments of the court below were in accord with those of other circuits, and serve to close a loophole which if left open could utterly defeat the Congressional purpose of eradicating racial discrimination in employment. One such loophole was stopped by this Court, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), by barring the use of racially neutral "objective" testing requirements not related to job performance but which disproportionately barred blacks from employment. But the court was not suggesting that subjective judgments were thereby made sacrosanct. It said specifically: "Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." (401 U.S. at 436). The court below, along with other courts throughout the country, have endeavored to close

or at least narrow the loophole of permitting reliance upon subjective criteria to perpetuate racial discrimination without redress.

II.

THE COMMENTS OF THE COURT OF APPEALS PROPERLY SET FORTH THE ISSUES AS TO WHICH BOTH PARTIES MIGHT INTRODUCE EVIDENCE AT THE NEW TRIAL.

As shown above (pp. 11a-24a), the modified majority opinion of the Court of Appeals bears no relationship to the issues discussed in Petitioner's argument. The court did *not* prescribe a shift in the burden of proof from plaintiff to defendant. And it did *not* require preferential treatment, in employment or in employment or in Title VII litigation, for blacks. It is important, therefore, to review what the court did say.

First of all, the court had to correct an apparent belief of the District Court that, that if an employee engaged in conduct not protected under the prohibition against retaliation in Section 704(a), 42 U.S.C. §2000e(3)(a), he was thereby barred from introducing any evidence that racial discrimination motivated the refusal to hire him, in violation of Section 703(a), 42 U.S.C. §2000e(2)(a):

> We think it is clear that an applicant for employment may be entitled to the protection of §2000e-2(a)(1) even though he participates in activities which fall outside the protection of §2000e-3(a). These statutes apply to wholly different facets of the employment relationship. Section 2000e-3(a) serves peripherally in the scheme of Title VII to shield an employee or applicant from employer retaliation. Section 2000e-2(a)(1) expresses Title VII's primary promise—equal employ-

ment opportunities for all. It would be antithetical to the remedial purposes of the Act to interrelate these sections so as to construe the Act to mean that an applicant's civil rights activities which fall outside §2000-3(a) may serve as a basis for employment disqualification without consideration of the separate standards called for by §2000e-2(a)(1).

(463 F.2d at 343).

The court went on to say "[o]n remand, the *parties* should be permitted to present such additional evidence as shall be relevant to the issue." (Emphasis supplied).

Next followed the revised Part V of the majority opinion, 463 F.2d 352 *et seq.* After pointing out the shortcomings of subjective employment criteria, discussed above, the court noted that employers seldom admit racial discrimination, that applicants must often rest their cases on proof of qualification for the job denied them,[10] that there was no dispute that Green had these qualifications and that after McDonnell refused to hire him it continued to seek applicants for the job it had denied him.

In the light of this background, the court stated that this would prove a *prima facie* case of racial discrimination, but added that McDonnell could show that Green's participation in unlawful conduct directed at McDonnell might indicate his lack of a responsible attitude toward

---

[10]Other courts have recognized that "the importance of choosing the ... more difficult method of proof–*i.e.*, presenting specific evidence of blacks' qualifications for jobs denied them–cannot be overstressed. *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 447 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); see also *Gates v. Georgia-Pacific Corp.*, 326 F. Supp. 397 (D. Ore. 1970).

performing work for McDonnell. The court imposed no limitation on the type of evidence McDonnell might offer in order to show this, and certainly no limitation on or disparagement of subjective evidence if that is what McDonnell chooses to employ.

Finally, the court said that Green in turn should be permitted to show that the reasons advanced by McDonnell for refusing to hire him were pretextual, or otherwise show the presence of racially discriminatory hiring practices by McDonnell which affected the decision.[11] It

[11] The Court of Appeals may have been moved to make this point because of admissions by key officials of McDonnell that their refusal to rehire Green was motivated by factors other than the "stall-in" or the "lock-in", including the peaceful picketing of a road leading to the home of the Chairman of the Board of McDonnel and a number of other reasons, not specified. (A. 163, 237, 411-12, 433-34, 492). Title VII has been consistently construed as barring employment decisions based on a combination of reasons some of which are proper and some forbidden. *King v. Laborers International Union of North America, Union Local No. 818*, 443 F.2d 273 (6th Cir. 1971); EEOC Decision No. 70-925, 1 CCH Employment Practices Guide §6158 (June 22, 1970); EEOC Decision No. 71-1902, 1 CCH Employment Practices Guide ¶6281, at p. 4498 (April 28, 1971); EEOC Decision No. 72-0264, 1 CCH Employment Practices Guide ¶6292, at p. 4520, n. 3 (August 6, 1971); *cf. Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970) (housing discrimination); *Budd Manufacturing Co. v. NLRB*, 138 F.2d 86, 90-91 (3d Cir. 1943), *cert. denied*, 321 U.S. 778 (1944); *NLRB v. Barberton Plastic Products, Inc.* 354 F.2d 66, 68 (6th Cir. 1965); *NLRB v. Historic Smithville Inn*, 414 F.2d 1358, 1361 (3d Cir. 1969) (National Labor Relations Act).

The decisions of the Equal Employment Opportunity Commission cited above constitute administrative interpretations of Title VII by the agency charged with enforcing it, and are "entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971); *Udall v. Tallman*, 380 U.S. 1 (1965).

It should also be noted that the House or Representatives rejected the "Dowdy Amendment" to Title VII, that would have

stated in conclusion that since the District Court had not used appropriate standards in determining whether McDonnell's refusal to hire Green was racially motivated, "[o]n remand, *both parties* will have the opportunity to present evidence on this matter." (Emphasis supplied).

Viewed in context, therefore, the court's reference to the possibility that Green's unlawful conduct indicated a lack of responsible attitude toward work for McDonnell constitutes merely a suggestion as to the possible relevance of that conduct to the disputed question of the real motivation behind McDonnell's refusal to hire Green. The modified opinion—as distinguished from that which had been superseded—does *not* require McDonnell to prove that Green's participation in the "stall-in" was job-related. What the opinion does require is that the "stall-in" must not have been mere pretext, and it imposes upon Green the burden of showing that McDonnell's stated reasons were in fact pretextual or otherwise tainted by racial discrimination.[12]

The court's modified opinion does not hinge on the application of *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), as petitioners mistakenly urge. The original panel opinion may indeed appear to reflect a *Griggs* analysis, to which Judge Johnsen's original dissent objected strenuously. The revised opinion, however, takes

---

qualified the Act to prohibit employer practices based *solely* on sex, race, national origin or religion, 110 Cong. Rec. 2728 (1964). And it was pointed out by Senator Case, one of the floor leaders supporting Title VII in the Senate, that such an amendment would have emasculated the Act. 110 Cong. Rec. 13,825 (1964).

[12]The modified opinion of the Court contains significant changes on this point which show that the Court was at pains to leave the burden of proof with *Green*. Cf. n. 13 below.

account of those objections and clearly indicates that the *Griggs* citation was merely supportive of the majority's reasoning, but by no means [fundamental] to it.[13]

[13]The original decision, after citing *Griggs*, stated:

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, we think he presents a prima facie case of racial discrimination and that . . . the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job. Here McDonnell has not demonstrated . . . that Green's participation in the "stall-in" would impede his ability to perform the job for which he applied.
>
> * * * * *
>
> If McDonnell can demonstrate that Green's participation in the "stall-in" in some objective way reflects adversely on job performance, McDonnell's refusal to rehire Green will be justified. 463 F.2d at 344.

This is *Griggs* language, *cf.* 401 U.S. at 431-432, 436.

In the revised opinion, this language is substantially modified to read:

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. However, an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer.
>
> . . . [T]he employer selected two [reasons], the "lock in" and the "stall in", as reasons for its refusal to rehire Green. Green should be given the opportunity to show that these reasons offered by the Company were pretextual, or otherwise show the presence of racially discriminatory hiring practices by McDonnell which affected its decision.

This is not *Griggs* language, but simply the ordinary treatment due any civil rights claim. Judge Johnsen's characterization of the original opinion as "predicated" on the passage quoted from *Griggs* is inapplicable to the opinion under scrutiny here. Petitioner's argument on this point is similarly off-target and directed against a non-existent holding.

The Court of Appeals was therefore doing nothing more than making sure that the District Court did not read into the broad prohibition of racial discrimination in Section 703(a) an exception that treated those who had engaged in conduct not protected under Section 704(a) as a special class of pariahs, forever to be denied protection against racial discrimination at the hands of the employer demonstrated against.[14]

---

[14]The National Labor Relations Act cases cited at pp. 31-33 of Petitioner's brief have no bearing on the instant case. Refusal to hire based entirely on legitimate, non-discriminatory, reasons is permitted under both statutes, and there is nothing in the decision of the Court of Appeals in the instant case to suggest any departure from that principle. To the extent that NLRA cases disqualify from relief persons who have engaged in wrongful or illegal conduct toward their employers, they are based on interpretations of provisions of Section 10(c) of the National Labor Relations Act, as amended, 29 U.S.C. §160(c), which authorize only "such affirmative action . . . as will effectuate the purposes of this Act." There is no comparable grant of discretion in Title VII to base a refusal of relief upon some prior misconduct on the part of a victim of discrimination; so long as the requirements of Section 706(g) of the Act (42 U.S.C. §2000-5(g)) are met and the reason for the employment decision was in whole or in part racial or other forbidden types of discrimination, the victim is clearly accorded a cause of action.

In this regard the two statutes are not similar, in either language or purpose. Unlike the National Labor Relations Act, the purpose underlying Title VII is not to assure industrial peace by preserving the right of employees to organize and engage in collective bargaining with their employers; instead, the Civil Rights Act of 1964 creates absolute statutory rights that have been assigned by Congress the "highest of priorities." *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); *Jenkins v. United Gas Co.*, 400 F.2d 28 (5th Cir. 1968); *Rosen v. Public Service Gas & Electric Co.*, 409 F.2d 775 (3d Cir. 1969). Manifestly, the standards articulated under the NLRA can provide only minimal guidance for protections afforded under Title VII. Cf. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 (5th Cir. 1969); *Flowers v. International Local No. 6*, 431 F.2d 205 (7th Cir. 1970).

The Opinion Below Does Not Require Preferential Treatment for Blacks

Petitioner's attempts to find in the opinion of the Court of Appeals—and specifically in the reference to "a black man" demonstrating qualification for a job—as mandating preferential treatment for blacks, are specious. As pointed out in the analysis of the opinion of the Court of Appeals in our Statement of the Case (p. 22, supra), the court's comments would apply equally to any claim of illegal employment discrimination, whether the victim were black or white.

III.

THERE ARE ALTERNATIVE GROUNDS UPON WHICH THIS COURT SHOULD AFFIRM THE EIGHTH CIRCUIT'S SUGGESTIONS TO THE DISTRICT COURT.

As noted throughout this brief, the Court of Appeals reversed the district court's order which struck plaintiff's claims based on §703. Petitioner did not appeal this decision, which conforms with decisions of other circuits. In remanding the case to the district court, the Court of Appeals suggested guidelines which the district court should apply in deciding the §703 issue. The Court of Appeals suggested:

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. (463 F.2d at 353).

It is this suggested guideline from which petitioner appeals. For the reasons stated in the first two arguments of this brief, we believe this Court should affirm the decision.

However, the record contains additional alternative bases for affirmance. This record suggests a pattern and practice of racial discrimination in employment by McDonnell, and specifically suggests racial discrimination in employment against Percy Green during his employment with the Company.

In spite of the severe limitations placed on discovery and the striking of the §703 claim, respondent's attorney was able to obtain evidence indicating that Green was the victim of racial discrimination when he was discouraged from seeking transfer to the research department because of the threat of layoff and a white employee subsequently made the move and was promoted to a higher classification (Leo Jeffress, A. 68).[15] When Green was afforded the opportunity to move to this department, where he was the only black among 100 men, he was denied a tour of the department as well as a training period, which had regularly been afforded to the white employees.

When the selection of employees was made for layoff it is highly suspect that McDonnell drew the line of initial layoff over the name of Green. It is even more indicative of racial discrimination that McDonnell retained fourteen men below Green on the totem pole; and discouraged Green from transferring to Cape Kennedy in view of the

---

[15]Green's work record is demonstrated in part by the Exhibits incorporated in Volume II of the Appendix. As late as March 6, 1964 his ratings by supervisors were average to above average (Pl. Exh. 5, A. 535). His performance record was rated as average (Pl. Exh. 2, A. 515). He had been given "secret" security clearance (Pl. Exh. 4, A. 522). His attendance record was highly satisfactory. His only absence from work was precipitated by his mother's illness (A. 71). He had taken 16 training courses commencing in October, 1956 to January, 1964 (Pl. Exh. 32, A. 565).

retention of all employees at Cape Kennedy. Finally, it is highly suggestive of discrimination that McDonnell requested Green to take an examination for transfer and then retained two whites who failed the test and one who was not asked to take it.

We do not suggest that this evidence of discrimination is sufficient to control the outcome of Green's §703 claims; and respondent's counsel expects to make a much more compelling showing of discrimination when given a proper opportunity to make discovery. However the evidence would justify this Court's affirming the decision below on the alternative ground that one persents a *prima facie* case by showing a history of racial discrimination or discrimination against a particular black applicant coupled with a showing that this qualified applicant was denied a job which remains open.

CONCLUSION

There is no error in the judgment or opinion of the Court of Appeals. They are in accordance with the language and purposes of the statute, as well as with the decision of this Court and lower courts. The judgment of the Court of Appeals should therefore be affirmed. McDonnell's true remedy is to prove its contentions at trial under these proper standards, not to seek here to upset the Court of Appeals' careful decision.

While counsel for respondent would of course prefer an affirmance on the merits, we feel obliged to invite the Court's attention to the fact that the "Questions Presented" in the Petition for Certiorari (p. 2) and in Petitioner's brief on the merits (p. 2) raise theoretical issues that bear no relationship to the decision of the court below. Similarly, the text of the Petition, and much

of that Petitioner's Brief on the merits, are based on a misunderstanding of the decision of the court below or on portions of its majority opinion that had been deleted when the opinion was modified. To rule on the imaginary issues raised by Petitioner would therefore be to render an advisory opinion on a hypothetical case. This Court may therefore wish to consider whether it would be appropriate to dismiss the writ as improvidently granted.

Respectfully submitted,

LOUIS GILDEN
722 Chestnut Street
St. Louis, Missouri 63101

Of Counsel:

JACK GREENBERG
JAMES M. NABRIT, III
WILLIAM L. ROBINSON
MORRIS J. BALLER
ALBERT ROSENTHAL

APPENDIX A

COMPLAINT OF EMPLOYMENT DISCRIMINATION UNDER 1964 CIVIL RIGHTS LAW

RE: HIRING

TO: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
FRANKLIN D. ROOSEVELT, JR.
WASHINGTON, D.C.

complainant: Percy H. Green
3402 LaSalle Street
Saint Louis 4, Missouri

Discrimination was practiced because of my race and because of my persistent involvement in the Civil Rights movement, by McDONNELL AIRCRAFT CORPORATION, BERKELY, MISSOURI.

Sunday, July 25, 2965 [sic] a McDonnell Aircraft advertisement appeared in the St. Louis Post Dispatch–Help Wanted section requesting Mechanics Electric and Radio–Grades 2 or 3, for Immediate Employment.

On Monday morning, July 26, 1965 at 8:15 A.M. I was given an application and directed to Room 226 to complete same. In Room 226, were 18 white persons, of which 5 were white women, all filling applications. I became the only Negro present. Before completing my application 2 Negro men, 1 Negro woman and 6 white men joined the group.

At 8:55 A.M. I returned the completed application form to the receptionist at a desk in the waiting room and was told to have a seat.

At 9:35 A.M. it became apparent that a Negro detective had been detailed to observe me, from a door and

window near where I had found a seat. I know this detective, from past observance, I don't know his name, but I can identify him.

At 10:45 A.M. nearly an hour and a half, after I had returned my completed application, I was called to the employment window and was told by N. Johnson, Jr. Badge Number 104151, QUOTE–"Thank you very much for submitting your application to McDonnell and if we can find a place we can use you–we will call you." UNQUOTE. I questioned this answer, stating that I didn't fully understand–as I was over qualified for the position to which I was making application, as I had previously worked for McDonnell for eight years in this and advanced jobs, and pointed out that the advertisement stated applicants were need for IMMEDIATE EMPLOYMENT. I further requested to speak with the Superior Officer of the Employment Division for further clarification of the dispensation of my application. This request, of course, was at first, ignored, and upon insistence, flatly refused; and, Mr. Johnson, Jr. in finality, stated, QUOTE–"I'm sorry I'll have to ask you to leave. I have other people to talk to." UNQUOTE. It was obvious while talking with Mr. Johnson that he was apprehensive and nervous and had received orders as to what to say to me from higher authority.

I pointed out the lapse in time as one and one half hours, after completing my application to the time I was called by Mr. Johnson, because I departed the premises at 10:57 A.M. and left, at that time with persons who had arrived at the Employment Office 45 minutes after I arrived.

I declare that the general pattern of discrimination employed in my specific application to McDonnell

Aircraft Corporation is the same kind used against the general Negro public, but perhaps not as overtly.

For further remarks and follow-up regarding the peculiar actions around my application for employment at McDonnell Aircraft Corporation you may contact Miss Betti Ruffin, 4553 Anderson, St. Louis, Mo. who was present during the entire episode.

_____

Percy H. Green

Subscribed to and sworn before me this _____ day of _____ 1965.

_____

(Seal and Signature Notary Public)

My commission expires _____

Exhibit E

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

NOTICE OF RIGHT TO SUE
WITHIN 30 DAYS

Certified Mail
Return Receipt Requested

MAR 19, 1968

In Reply Refer to:
Case No. 5-7-18
McDonnell Aircraft Corporation
St. Louis, Missouri

Mr. Percy H. Green
3119 Lawton Place
St. Louis, Missouri

Dear Mr. Green:

This is to advise you that conciliation efforts in the above matter have failed to achieve voluntary compliance with Title VII of the Civil Rights Act of 1964. Pursuant to Section 706(e) of the Act, you are hereby notified that you may, within thirty (30) days of the receipt of letter, institute a civil action in the appropriate Federal District Court. If you are unable to retain an attorney, the Federal Court is authorized in its discretion, to appoint an attorney to represent you and to authorize the commencement of the suit without payment of fees, costs or security. If you decide to institute suit and find you need assistance, you may take this letter, along with the Commission determination of reasonable cause to believe Title VII has been violated, to the Clerk of the

Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

Please feel free to contact the Commission if you have any questions about this matter.

Sincerely yours,

Robert L. Randolph /s/

Robert L. Randolph (Acting)
Director of Compliance

Exhibit "C"

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Percy H. Green — Case No. 5-7-18

Charging Party

vs.

McDonnell Aircraft Corporation
St. Louis, Missouri

Respondent

Date of alleged violation: July 26, 1965
Date of filing: September 14, 1965
Date of service of charge: August 1, 1966

DECISION

SUMMARY OF CHARGE

The Charging Party, a Negro, alleges that Respondent discriminated against him because of race and his persistent involvement in the civil rights movement in the community by refusing to hire him on July 26, 1965. He alleges that he responded to Respondent's ad for Mechanics, Electric and Radio, for "immediate employment" and completed the necessary applications, that he was told he would be called "if we can find a place for you," and that he waited a period of six weeks without hearing from Respondent.

SUMMARY OF INVESTIGATION

Respondent is an employer within the meaning of the Act and is engaged in a business affecting commerce. The corporation is a prime government contractor engaged in the manufacture of aircraft and aerospace vehicles for all

SUMMARY OF INVESTIGATION (continued)

branches of the U.S. Military Services, Federal Aviation Agency, and several N.A.T.O. powers.

Charging Party is a former employee of McDonnell Aircraft Corporation. He was hired by Respondent on August 27, 1956, and worked as an electric and radio mechanic for seven years. At the time he was laid off due to a reduction in force, the Charging Party was classified as a research and development technician.

In September 1965, Charging Party filed charges of discrimination because of race and his participation in civil rights activities with the Missouri Commission on Human Rights, the Department of Labor, and the Equal Employment Opportunity Commission. The complaint to the Department of Labor was investigated by the Department of Navy and the investigation was closed June 13, 1966. The investigation by the Missouri Commission on Human Rights was pending at the time of this investigation. On January 19, 1966, the Charging Party was advised that the Commission had deferred the charge to the Missouri Commission on Human Rights and that that initial deferral had expired. On February 4, 1966, Charging Party requested the Equal Employment Opportunity Commission to assert jurisdiction.

The investigator attempted to serve the charge on August 1, 1966. The company representatives, the Director of Personnel, the Manager of Personnel Services, and Respondent's Attorney, refused to receipt the charge for the stated reason that they could see no reason for again accepting service and being investigated. Further, Respondent challenged the validity of the charges since

SUMMARY OF INVESTIGATION (continued)

they were identical to the charges previously served upon the company by the Missouri Commission on Human Rights and the Navy Department. The Director of Personnel stated that McDonnell's stand has not changed one iota from that reported to the Navy.

Respondent's representatives admitted that the Charging Party was well qualified for the position for which he applied, but reaffirmed that under no circumstances would the Charging Party be rehired. They denied that Green had been refused employment because of race and cited statistics on the number of Negroes employed by Respondent to substantiate their position. The Director of Personnel stated that a person such as Green would not be hired now or ever by McDonnell, as he would have a disruptive influence on other employees and undermine the present harmonious atmosphere within the plant.

The investigation reveals that the Charging Party was very active in civil rights matters during his employment. He demonstrated against the discriminatory employment patterns of those constructing the "Arch" which was being constructed in St. Louis as a part of a National Park commemorating the Settling of the West. As a result of the incident, the Charging Party was questioned by two members of the Personnel Department who indicated a concern as to the effect of Charging Party's activities on McDonnell Aircraft. Charging Party denied that any adverse reaction would accrue to McDonnell Aircraft since neither the police nor the press had been told where the Charging Party was employed. Charging Party stressed that he would not lose any time from his job due to his activities.

SUMMARY OF INVESTIGATION (continued)

Subsequent to the time of the "Arch" demonstration, the Charging Party engaged in numerous demonstrations protesting the employment plight of minority groups. On July 2, 1965, Charging Party as Chairman of ACTION sent a demand letter to McDonnell Aircraft Corporation. The letter demanded an end to "overt discriminatory practices in hiring, upgrading, and layoff" and demanded 3,400 jobs for Negroes. Copies of the letter were sent to Messrs. F.D. Roosevelt, Jr., former Chairman of the Commission, and Frank Karsten, and U.S. Attorney Fitzgibbons. ACTION demonstrated against other companies in the St. Louis area.

Although Respondent denies that Charging Party's involvement in civil rights activities was the reason for rejecting his application for employment, a specific finding of the prior investigative report prepared by the U.S. Navy was that civil rights activity was a factor in Respondent's refusal to accept Charging Party's application. In addition to protecting an individual's rights against an employer for failure or refusal to hire because of race, color, religion, sex, or national origin, Section 704 of Title VII of the Act protects the individual's right to be free of intimidation, coercion, and reprisals because he has opposed discriminatory employment practices. There is no doubt that Respondent considered the Charging Party an undesirable employee because of his civil rights activity and used that as a basis for refusing to rehire him.

SUMMARY OF INVESTIGATION (continued)

DECISION

Reasonable cause exists to believe that Respondent violated Section 704(a) of the Civil Rights Act of 1964 by refusing to accept the Charging Party for employment because of his involvement in civil rights activities.

For the Commission

(signed Marie D. Wilson)
Marie D. Wilson
Secretary

Date May 8, 1967

GREEN v. McDONNELL DOUGLAS CORPORATION
Cite as 463 F.2d 337 (1972)

Percy H. GREEN, Plaintiff-Appellant,

v.

McDONNELL DOUGLAS CORPORATION, Defendant-Appellee.

No. 20596.

United States Court of Appeals,
Eighth Circuit.
March 30, 1972.

Rehearing and Rehearing En Banc
Denied May 12, 1972.

Rehearing Denied June 28, 1972.

* * * * *

[338] Before JOHNSEN, LAY and BRIGHT, Circuit Judges.

BRIGHT, Circuit Judge.

Percy Green, a black citizen, brought this action against McDonnell-Douglas Corporation (McDonnell) under Title VII[1] of the Civil Rights Act of 1964, seeking relief from the latter's allegedly discriminatory conduct in denying Green employment in July 1965. Green also pressed a claim that McDonnell had discharged him from a job in August 1964 for reasons of race in violation of 42 U.S.C. §1981. The district court denied Green any

[1] 42 U.S.C. §2000e et seq.

relief. Green v. McDonnell-Douglas Corporation, 318 F. Supp. 846 (E.D. Mo. 1970). Green prosecutes this timely appeal. For the reasons stated below, we reverse and remand this case for further proceedings.

To place this controversy in an appropriate frame of reference, we find it necessary to examine chronologically both the underlying facts and the procedures followed in the district court. Although the immediate controversy springs from the refusal of McDonnell to employ Green on July 26, 1965, its origin lies in an earlier employment relationship. In [339] 1956, McDonnell employed Green as a mechanic. He remained with the company continuously, except for twenty-one months of honorable military service, until he was laid off on August 28, 1964. Initially, Green's job was protected by union security, but in 1963 he transferred to a non-union position as a laboratory technician, performing work on research projects in the Electronic Equipment Division of McDonnell. In 1964, the workload decreased in the Electronic Equipment Division, and the company laid off several persons, including Green.

Green, a long-time activist in the movement to obtain equal rights for black citizens, vigorously protested his discharge as being racially motivated. He also filed formal complaints of discrimination with the President's Commission on Civil Rights, the Justice Department, the Department of the Navy, the Defense Department, and the Missouri Commission on Human Rights. As a member of CORE, and later as a member of ACTION, another civil rights organization, Green, in late 1964 and during 1965, participated in several demonstrations which were staged to call attention to McDonnell's allegedly discriminatory employment practices. These demonstrations included picketing the home of James F. McDonnell,

Chairman of the Board of McDonnell; blocking a main highway access route leading to the McDonnell plant during a traffic "stall-in"; and, participating in a civil rights demonstration during which the doors of a downtown St. Louis building which housed certain McDonnell employees were locked with chains by some of the demonstrators.

On July 25, 1965, McDonnell ran an advertisement in the St. Louis, Missouri, newspapers seeking qualified electrical mechanics. The next day Green applied for one of these positions, but McDonnell, although still seeking qualified mechanics, refused to hire him. McDonnell never has disputed Green's technical ability to perform the work required in that position. Thereafter, on September 14, 1965, Green filed a formal complaint with the Equal Employment Opportunity Commission (EEOC), alleging that McDonnell had discriminated against him "because of [his] race and because of [his] persistent involvement in the Civil Rights Movement." On May 8, 1967, the EEOC determined that reasonable cause existed to believe that McDonnell had violated 42 U.S.C. §2000e–3(a) by refusing to employ Green "because of his involvement in civil rights activities."[2] It made no determination on the allegation of racial bias.

The EEOC unsuccessfully attempted to conciliate the dispute. Accordingly, on March 19, 1968, it issued a thirty-day letter notifying Green that he might institute civil action in federal court pursuant to 42 U.S.C. §2000e–5(e). This litigation followed.

---

[2]The EEOC abstained from taking action in deference to the Missouri Commission on Human Rights, *see* 42 U.S.C. §2000e-5(c), until February 4, 1966, when Green requested the EEOC to assert jurisdiction.

In a complaint filed April 15, 1968, Green alleged that McDonnell had discriminated against him by denying him employment "because of his involvement in civil rights activities." On March 20, 1969, Green filed an amended complaint alleging that McDonnell also had discriminated against him by denying him employment "because of his race and color." Upon motion of McDonnell, the district court struck this additional claim on the ground that the EEOC had made no finding as to reasonable cause on this claim. Green v. McDonnell-Douglas Corp., 299 F. Supp. 1100 (E.D. Mo. 1969).

Although 42 U.S.C. §1981[3] was not specifically mentioned in any of the pleadings, Green, during trial and in [340] post-trial briefs, construed the pleadings to assert that his 1964 layoff was motivated by racial prejudice in violation of that statute.

The district court rejected Green's claim that McDonnell denied him employment in 1965 because of his participation in protected civil rights activities. The court also rejected the 1964 layoff claim brought under §1981. It summarized its conclusions as follows:

(a) Plaintiff has not shown that defendant was motivated by racial prejudice or because of plaintiff's legitimate civil rights activities.

---

[3]Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right to every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) Plaintiff's layoff claim under 42 U.S.C. §1981 is barred by the statute of limitations.

(c) The Civil Rights Act does not protect activity which blocks entrance into or from an employer's plant or office.

(d) Defendant's refusal to reemploy plaintiff was based on plaintiff's misconduct, which justified the refusal to rehire. [318 F. Supp. 851]

On this appeal, Green raises the following contentions:

(1) The trial court erred in dismissing his claim under 42 U.S.C. §1981 for relief from his allegedly unlawful layoff.

(2) The trial court erred in determining that his participation in the "lock-in" and "stall-in" demonstrations did not fall within the protection of 42 U.S.C. §2000e-3(a).

(3) The trial court erred in striking the allegations of the complaint which charged McDonnell with denying him employment for reasons of race.

I.

[1] We turn first to the issues relating to the 1964 layoff. Several circuits, following the rationale of Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186; 20 L.Ed.2d 1189 (1968), have concluded that 42 U.S.C. §1981 affords a remedy in federal court for private discrimination in employment. Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), cert. denied, 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971); Waters v. Wisconsin Steel Works of International Harvester Co., 427 F.2d 476 (7th Cir.), cert. denied, United Order of American Bricklayers and

Stone Masons Local 21, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970). This court has not yet passed upon this question. We find it unnecessary to do so here since, even if we assume that such an action will lie, the action in this case would be barred by the applicable statute of limitations.

[2] Although §1981 contains no limitation period, an action for deprivation of civil rights brought under a federal statute such as §1981 is governed by the most analogous state statute of limitations. *See* Glassco v. Howell, 431 F.2d 863, 864 (8th Cir. 1970); Waters v. Wisconsin Steel Works of International Harvester Co., *supra*, 427 F.2d at 488. In this case, the parties agree that Missouri's five-year limitation period for contracts[4] is the most analogous period of limitation. Within that limitation period, Green filed no pleading which mentioned either the 1964 layoff or 42 U.S.C. §1981.

On August 24, 1970, several months after the trial court had heard the evidence, and more than five years after the 1964 layoff, Green moved under Fed. R. Civ. P. 15(b) to amend his complaint to charge discrimination in "violation of 42 U.S.C. §1981 in that it was based on race, color, and civil rights activities." The trial court denied leave to amend. The record discloses that McDonnell did not expressly or impliedly consent to any [341] action under §1981, and that any evidence relating to the 1964 lay off was introduced as a background for Green's claim to relief from McDonnell's refusal to hire him in July 1965.

Green contends that his amended complaint, which was filed within the limitation period, should be con-

---

[4] Mo. Ann. Stat. §516.120(1) (1952).

strued to state a claim under §1981 for discrimination in the 1964 layoff. We cannot accept his broad reading of the language contained in the amended complaint. Although that complaint alleges discrimination "because of... race and color," it specifically refers to unlawful employment practices occurring on "July 26, 1965, and thereafter." This language convinces us that the amended complaint was not intended to encompass the 1964 layoff. Accordingly, we conclude that the district court properly dismissed the layoff claim.

II.

We now examine Green's contention that the district court erred in ruling that his participation in the "stall-in" and "lock-in" demonstrations did not fall within the protection of 42 U.S.C. §2000e-3(a). We confine our discussion here to the question whether Green's participation in the "stall-in" is a protected activity under §2000e-3(a). The record does not support the trial court's conclusion that Green "actively cooperated" in chaining the doors of the downtown St. Louis building during the "lock-in" demonstration. *See* Judge Lay's concurring opinion, *infra*. We therefore measure the protection afforded by §2000e-3(a) against Green's admitted participation in the "stall-in."

Section 2000e-3(a), as pertinent, reads:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

In support of his protection argument, Green stresses the language forbidding discrimination "because [an applicant] has opposed any practice made an unlawful employment practice by this subchapter." According to Green, since the "stall-in" was a non-violent protest designed to call attention to McDonnell's allegedly discriminatory practices, this activity commands the protection of §2000-3(a). McDonnell, on the other hand, asserts that the unlawfulness of this protest removes it from the protection of that section.

[3] We find little relevant authority for either position. The legislative history of Title VII provides us with no guidance as to the scope of the protection afforded by §2000e-3(a), and the small body of case law surrounding that section contains little discussion on the subject.[5] Nevetheless, we think it is clear from the language of the statute that Congress sought to protect employees and job applicants from employer retaliation for filing complaints to the EEOC. Those who have the courage to challenge disoriminatory practices of an employer merit that protection. Without doubt, lawful protest also commands the same protection, but we find no suggestion that protection extends to activities which run afoul of the law. Accordingly, we agree with the district court that the "stall-in" demonstration was not a protected activity under §2000e-3(a).

[5] As support for his position, Green cites passages from Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969). In that case, the Fifth Circuit held that §2000e-3(a) prohibits an employer from discharging an employee who makes false statements in a complaint to the EEOC. Although the opinion characterized the protection of §2000e-3(a) as broader than the analogous protection afforded an employee under the Fair Labor Standards Act, 29 U.S.C. §215(a) (3), and under the National Labor Relations Act, 29 U.S.C. §158(a) (4), the court did not attempt to define the parameters of §2000e-3(a).

III.

[342] We find merit in Green's contention that the district court erred in striking the allegation that McDonnell denied him employment in July 1965 "because of his race and color." Such discriminatory practices are prohibited by 42 U.S.C. §2000e-2(a)(1), which provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

[4] As noted above, the district court struck this allegation on the gound that the EEOC had made no finding of reasonable cause. Although the enforcement provisions of Title VII are silent as to the necessity of such a finding, it is now well settled that a complaining party need satisfy only two jurisdictional prerequisites in order to bring suit against an employer under Title VII: first, he must file a complaint with the EEOC; and second, he must receive the statutory notice of the right to sue. *See* Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136 (5th Cir. 1971); Flowers v. Local No. 6, Laborers International Union of North America, 431 F.2d 205 (7th Cir. 1970); Fekete v. U.S. Steel Corp., 424 F.2d 331 (3d Cir. 1970); Culpepper v. Reynolds Metal Co., 421 F.2d 888 (5th Cir. 1970); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969). Moreover, four circuits have squarely held that an EEOC finding of reasonable cause is not a jurisdictional prerequisite to suit. Robinson v. Lorillard Corp., *supra*;

Beverly v. Lone Star Lead Construction Corp., *supra*; Flowers v. Local No. 6, Laborers International Union of North America, *supra*; Fekete v. U.S. Steel Corp., *supra*.

[5] In this proceeding, Green satisfied the established prerequisites to a Title VII suit. His formal complaint to the EEOC stated that McDonnell had discriminated against him "because of [his] race and because of [his] persistent involvement in the Civil Rights Movement." We hold that Green was entitled to judicial review of all grounds of employment discrimination alleged in his complaint to the EEOC, and that the district court's ruling to the contrary was erroneous.

IV.

In anticipation of an adverse ruling on this issue, McDonnell argues that Green sustained no prejudice from the trial court's erroneous ruling because the trial court actually considered the racial discrimination claim and ruled against Green on the merits. Therefore, the argument continues, the district court's decision should be affirmed despite this erroneous ruling.

We cannot accept McDonnell's suggestion that it should prevail on an issue that Green was not privileged to present. We cannot say that the district court's action in striking the racial discrimination claim did not hamper the preparation and presentation of Green's case, notwithstanding the commendable zeal displayed by his counsel in producing an abundant record of events and circumstances relating to Green's employment relationship with McDonnell. Additionally, as discussed in part V below, the district court failed to consider whether the reasons given by McDonnell for not rehiring Green were related to the requirements of the job. Instead, the

district court simply assumed that, since the "lock-in" and "stall-in" protests were unprotected activities, McDonnell's refusal to rehire Green could not be violative of 42 U.S.C. §2000e-2(a)(1). The district court said:

> It must be remembered that so far as the Civil Rights Act goes, the employer may discharge or refuse to reemploy for any reason, except discrimination or because of practices made [343] unlawful under Title VII. The testimony and evidence before the court fails to establish by its greater weight, or preponderance, that defendant's refusal to rehire plaintiff resulted from racial prejudice or plaintiff's legitimate civil rights activites. It seems clear from the record that defendant's reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the "stall in" and the "lock in" demonstrations. The burden of proving other reasons was on the plaintiff. [318 F. Supp. at 850]

[6] We think it is clear that an applicant for employment may be entitled to the protection of §2000e-2(a) (1) even though he participates in activities which fall outside the protection of §2000e-3(a). These statutes apply to wholly different facets of the employment relationship. Section 2000e-3(a) serves peripherally in the scheme of Title VII to shield an employee or applicant from employer retaliation. Section 2000e-2(a)(1) expresses Title VII's primary promise—equal employment opportunities for all. It would be antithetical to the remedial purposes of the Act to interrelate these sections so as to construe the Act to mean that an applicant's civil rights activities which fall outside §2000e-3(a) may serve as a basis for employment disqualification without consideration of the separate standards called for by §2000e-2(a)(1).

In the light of this record, we deem it necessary to remand this case to the district court for reconsideration of the racial discrimination issue in accordance with the standards discussed below. On remand, the parties should be permitted to present such additional evidence as may be relevant to the issue.

V.

[352] The record shows that McDonnell has taken the position that it has the right under Title VII to make subjective hiring judgments which do not necessarily rest upon the ability of the applicant to perform the work required. Upon that hypothesis, and apparently because the pleadings did not require McDonnell to defend the charge that its refusal to rehire Green was racially motivated, McDonnell rested its case upon a showing that Green had participated in unlawful civil rights activities as reasons for declining to rehire him.

[7, 8] Our prior decisions make clear that, in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination. *See* Moore v. Board of Education of Chidester School District No. 59, Chidester, Ark., 448 F.2d 709 (8th Cir. 1971). *See also* Carter v. Gallagher, 452 F.2d 315 (8th Cir., 1971). We reaffirm this principle here. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). In enacting Title VII, Congress has mandated the removal of racial barriers to employment. Judicial acceptance of subjectively based hiring decisions must be limited if Title VII is to be more than an illusory

commitment to that end, for subjective criteria may mask aspects of prohibited prejudice. Employers seldom admit racial discrimination. Marquez v. Omaha District Sales Office, Ford Division, 440 F.2d 1157, 1162 (8th Cir. 1971). Its presence is often cloaked in generalities or vague criteria which do not measure an applicant's qualifications in terms of job requirements. Consequently, a black job applicant must usually rest his case of discrimination upon proof that he possessed the requisite qualifications to fill the position which was denied him. In this case, it is undisputed that Green possessed the requisite skills to perform the work for which he applied, and that McDonnell was seeking qualified applicants at the time it refused to hire him and continued to seek qualified appli-[353] cants thereafter. Moreover, Green's prior performance with McDonnell had earned him a "satisfactory" rating.

[9] When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. However, an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer.

Of the several civil rights protests which Green directed against McDonnell, the employer selected two, the "lock-in" and the "stall-in," as reasons for its refusal to rehire Green. Green should be given the opportunity to show that these reasons offered by the Company were pretextual,[6] or otherwise show the presence of racially

[6] McDonnell advanced an unsupported charge that Green had "actively cooperated" in the "lock-in." *See* Judge Lay's concurring opinion, *infra*.

discriminatory hiring practices by McDonnell which affected its decision.

The district court did not use appropriate standards in determining whether McDonnell's refusal to hire Green was racially motivated. On remand, both parties will have the opportunity to present evidence on this matter.

The amount of lost earnings claimed by Green is not great,[7] but the parties regard this as an important case and have devoted substantial time and energy to its litigation. Although the litigation is still not completed, we deem it appropriate to allow appellant a reasonable attorney's fee for this appeal, to be taxed as costs, upon counsel's submission of an estimate of his fee containing details of his services and time spent on this appeal. *See* 42 U.S.C. §2000e-5(k).

---

[7]The record shows that Green obtained reasonably equivalent employment subsequent to July 26, 1965, the date when McDonnell refused to rehire him. Under these circumstances, the district court may limit relief, if any is to be given, to damages based on Green's loss of earnings between July 26, 1965, and the date on which he acquired reasonably equivalent employment, which loss Green estimated to be between four and five thousand dollars.